No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

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In view of the fact that the Supreme Court of Utah construed the exemption statute to exempt the salary here in question, that court never reached and never could reach the question of whether the statute if construed in some other way would offend the federal Constitution.

If the Supreme Court of Utah had construed the statute in such a way that it did not grant exemption for the salaries in question, the court would then have reached the federal question as to whether the statute thus construed offended the federal Constitution. This would have been the decision of a federal question. Cf. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.

It is noteworthy that in *Brush* v. *Commissioner*, 300 U. S. 352, the salary involved was held exempt from federal taxation under a federal regulation almost identical to the statute involved in this case although in the absence of such a provision a contrary result might have been reached. See *Helvering* v. *Gerhardt*, 304 U. S. 405. So, under the statute involved in this case, respondent's salary is exempt from taxation regardless of what would be the case in the absence of such a State statute. If in any respect the court below might be said to have gone further than this Court has gone or would be willing to go, the question would still not be a subject for review here. For example, if comparable exemptions had been present in the State statutes involved in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Silas Mason Co.* v. *Tax Commission*,

supra, those cases might well have been decided in favor of the taxpayer as a matter of State law.

4. It must further be noted that what constitutes an "essential governmental function" within the meaning of the State statutes cannot be a federal question since this Court does not recognize a distinction between essential and nonessential governmental functions *of the United States*. Such a distinction is borrowed from the decisions of this Court regarding the functions *of the States* (although even there the distinction of governmental and proprietary functions is more common) and is not applicable to the United States. This was stressed as early as *McCulloch* v. *Maryland*, 4 Wheat. 316, and reiterated many times. See *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Helvering* v. *Therrell*, 303 U. S. 218; *Helvering* v. *Gerhardt*, *supra*. It should be necessary merely to call the attention of this Court to the First Bank of the United States created in the exercise of sovereign powers delegated to the federal government and to contrast it with banks created and owned by the States in the exercise of their reserved proprietary powers. See *Osborn* v. *Bank of U. S.*, 9 Wheat. 738, 860, and *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257.

We can perceive no indication that the analysis of the functions of the Panama Railroad Company in the *Rogers* case shows any intention to depart from the distinction between State activities

Miscellaneous—Continued.

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OPINION BELOW

The opinion of the Supreme Court of Utah (R. 47) is reported in 79 Pac. (2d) 6.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on May 6, 1938 (R. 63). A petition for rehearing was denied and the order entered on July 5, 1938 (R. 63). On October 3, 1938, Mr. Justice Butler granted an extension of sixty days

in the time within which a petition for the writ of certiorari might be filed in this Court (R. 66). The petition for a writ of certiorari was filed on December 1, 1938, and was granted on January 3, 1939. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the decision of the court below rests upon an adequate non-federal ground in that it construed the taxing laws of its State to omit as a subject of taxation the salaries received by respondent as Agency Counsel for Reconstruction Finance Corporation and as counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah.

2. Whether the salaries so received by respondent are omitted as a subject of taxation from the taxing laws of the State of Utah.

3. Whether the salaries so received by respondent are immune from taxation by the States.

STATUTES INVOLVED

The applicable statutory provisions are set forth in part in the Appendix (*infra*, p. 66), and in part in a pamphlet of laws entitled "Reconstruction Finance Corporation Act as Amended, and Other Laws and Documents Pertaining to Reconstruction Finance Corporation, August 1938 (Revised)," which is filed with this brief.

STATEMENT

In 1935 respondent was Agency Counsel for the Salt Lake City Agency of Reconstruction Finance Corporation (herein called "Reconstruction") and counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah (herein called "Regional") (R. 6–7). In such capacities it was respondent's duty to perform the legal services required by Reconstruction and Regional in the areas served by the Salt Lake City Agency of Reconstruction and by Regional (R. 7). For such legal services rendered Reconstruction, respondent was paid a fixed monthly salary, and these services were performed under the direction, supervision, and control of the Board of Directors, the General Counsel, and the Solicitor of Reconstruction (R. 12). For such legal services rendered Regional, respondent was paid a designated amount per day, and these services were performed under the direction, supervision, and control of the General Counsel and General Solicitor of the Farm Credit Administration (R. 12). Such payments were made by checks drawn on the Treasurer of the United States by the Treasurer of Reconstruction and Regional, respectively (R. 7). A more detailed statement regarding Reconstruction, Regional, and their officers and employees is contained, *infra*, at pp. 25 to 40.

Respondent filed an income-tax return as required by the Utah statutes for that year, claiming

exemption with respect to salaries received from these governmental instrumentalities (R. 1–1a). Upon receipt of notice from the State Tax Commission of Utah that it proposed to adjust respondent's income tax liability to include such salaries, respondent filed with it a petition for redetermination of the tax (R. 5). This petition was denied (R. 44). On certiorari to the Supreme Court of Utah, the order of the State Tax Commission of Utah was reversed and the exemption of respondent's salaries from taxation by the State of Utah sustained (R. 47–63).

ARGUMENT

I. THE DECISION OF THE COURT BELOW WAS BASED SQUARELY UPON THE CONSTRUCTION OF THE UTAH TAXING STATUTE WHICH WAS HELD TO OMIT RESPONDENT'S SALARIES AS A SUBJECT OF TAXATION, AND THEREFORE THAT DECISION DID NOT AND COULD NOT REACH THE FEDERAL QUESTION AND SHOULD NOT BE REVIEWED

1. As stated by the court below—

> The question for determination is whether or not the plaintiff's salary as agency counsel for the Salt Lake Agency of the Reconstruction Finance Corporation * * * and his salary as counsel for the Regional Agricultural Credit Corporation of Salt Lake City * * * are either of them or both taxable income for the purpose of the State income tax law (R. 47).

The Utah income tax law, in defining what constitutes gross income (Subsection (2) (g) of Section

80–14–4), lists certain exemptions including the following:

> (g) Amounts received as compensation, salaries, or wages from the United States or any posession [sic] thereof *for services rendered in connection with the exercise of an essential governmental function.* [Italics added.]

The court, in commenting upon this subsection, said:

> Under the last quoted section the taxpayer is entitled to exclude from his gross income, in order to arrive at the figure for his taxable net income, any salary from the United States for "services rendered in connection with the exercise of an essential governmental function" (R. 48).

While the court stated that the statute was a recognition of the immunity existing under the federal laws and Constitution and suggested the possibility of a reconsideration of the doctrine of *Rogers* v. *Graves,* 299 U. S. 401, it nevertheless said:

> Our statute having made exempt salaries, wages, and compensation received "from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function," we must decide this case *under our statute* in the light of the meaning of its terms as construed by the Supreme Court of the United States (R. 62). [Italics added.]

It will be seen, therefore, that the court below construed its own statute. In these circumstances the judgment will be deemed to rest on State grounds adequate to support it.

In *Supreme Lodge K. P.* v. *Meyer*, 265 U. S. 30, the Supreme Court of Nebraska considered whether certain action taken by a fraternal insurance order was taken by a representative form of government as required by a Nebraska statute and concluded that it was not. This Court said on review, on p. 32:

> Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein.

So far as this Court is concerned then, with the construction placed upon sub-paragraph (g) by the Supreme Court of Utah, the section may be regarded as reading as follows:

> The amounts received as compensation, salaries or wages from the United States—for services rendered in connection with the exercise of an essential governmental function, including the functions of the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation.

2. Nor does it matter that federal laws or cases may be relevant to a determination of State ques-

tions. In the case of *Miller's Executors* v. *Swann*, 150 U. S. 132, it was said, at p. 136:

> The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.

And in the case of *Louisville and Nashville Railroad Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, it was said, at page 302:

> If the jurisdiction of the United States court does not depend entirely upon diversity of citizenship it is because the suit arises under the laws of the United States. Judicial Code, § 24. But when, as here, the founda-

> tion of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfill. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Railway* v. *Massachusetts*, 207 U. S. 79, 84.

The cases just referred to have been very recently recognized in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 507, and the *Louisville and Nashville* case was cited as authority for dismissal in *Pierce, as Trustee* v. *Dahlgren*, 256 U. S. 682, 683.[1]

It is submitted that in the instant case the contention that there are adequate State grounds upon which the judgment below rests has even greater force than in the cases cited above. No reference to any federal statute was incorporated

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[1] The instant case differs from such cases as, for example, *Silas Mason Co.* v. *Tax Commission*, 302 U. S. 186, since there State statutes were construed merely as an incident to determining the extent of a grant to the United States and consequently the extent of federal jurisdiction over particular lands. Even in such instances the interpretation put upon State statutes by State courts is given great weight and will be accepted unless it does violence to federal rights. *Silas Mason Co.* v. *Tax Commission*, *supra*, at pages 206–207.

in the Utah law now under review. The State legislature merely exempted federal salaries paid for services rendered in connection with the exercise of an essential governmental function, and the court below decided that the functions here involved were such functions.

That the court below considered decisions of this Court in its interpretation of the Utah statutes makes the question none the less an interpretation of State statutes. Cf. *Levy* v. *Superior Court,* 167 U. S. 175, 177.

3. Whatever the holdings of this Court have been—however the decisions heretofore rendered may be applied to this case or their facts distinguished—it cannot be denied that a State has the *uncontrolled* right to exempt from the operation of its income tax laws any income that its legislators deem wise to exempt. As is doubtless known to this Court and as is demonstrated, *infra,* pages 49 to 60, numerous measures are now pending before Congress designed to confer upon the States power to tax federal salaries. If it be assumed that one such measure becomes effective and removes inhibitions under the federal Constitution or laws to taxation of federal salaries by the States, nevertheless it would in no way affect what the legislature of the State of Utah has expressly declared exempt nor what such legislature has said to be exempt as such language is construed by the highest court of Utah.

on the one hand and federal activities on the other. When we remember that the Panama Railroad Company was organized under the laws of the State of New York many years prior to the construction of the canal, that it was originally organized with private capital, that it was entirely owned by private individuals, and that its incorporation was not for any other purpose than to serve private commercial ends, the reason for the close scrutiny of its activities which the Court gave in the *Rogers* case is apparent. In these circumstances it is readily understood why the operation of the canal and all its related and incidental activities should have been brought under careful review by this Court. After scrutinizing all the activities of the federal government in connection with the canal the Court indicated that they were all essential to its operations, and must be regarded as an enterprise which could be correctly characterized as governmental. In this connection, we should like to call attention to the comments of this Court on the case of *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, which appear in the opinion in the *Rogers* case at page 404:

> "For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal." In a footnote following that statement, we pointed out that the stock in the railroad company was acquired in order that the railroad might be used in

> the manner most helpful to the government in constructing the canal, and cited public documents which sustained that view.

and later, at p. 406:

> That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt.

There was no discussion here as to whether or not the functions performed by the railroad company or any of the correlated activities were essential. They were held to be governmental, i. e., exclusively functions of the United States relating to delegated powers, and that was sufficient.

If a function is a federal governmental function at all it must be regarded as an essential one, since, within the Constitution, Congress is the sole judge of what is essential to the operation of the federal government, and to the achievement of governmental ends at the time when legislation is enacted. In *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, this Court had before it a question involving the construction of the provisions of the National Bank Act of June 3, 1864. The Court said, by Mr. Justice Swain, at page 33:

> The constitutionality of the Act of 1864 is not questioned. * * * The national

> banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. *Of the degree of the necessity which existed for creating them Congress is the sole judge.* [Italics added.]

See also *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 290; *Smith* v. *Kansas City Title and Trust Co.,* 255 U. S. 180; and *Easton* v. *Iowa,* 188 U. S. 220.

II. ASSUMING THAT THE PROPER INTERPRETATION OF THE PHRASE "ESSENTIAL GOVERNMENTAL FUNCTION" AS USED IN THE UTAH STATUTES CAN BE DEEMED A FEDERAL QUESTION, RESPONDENT'S SALARIES HERE INVOLVED ARE OMITTED AS SUBJECTS OF TAXATION FROM THE STATE TAXING LAWS

1. We have shown that the United States in the exercise of delegated powers can exercise only governmental functions, and it has been recognized since *McCulloch* v. *Maryland, supra,* that there can be no difference of degree as to the essentiality of the functions of the United States.

Moreover, we shall demonstrate, *infra,* pp. 25 to 40, that Reconstruction and Regional are engaged exclusively in exercising traditional and important functions of the United States, and if the phrase "essential governmental functions" is to be applied to any federal activities it is clear that Reconstruction and Regional are exercising such functions.

Accordingly on either basis respondent's salaries are omitted as subjects of taxation by the State taxing laws.

2. In addition we shall now turn briefly to a consideration of the word "essential" as it has been considered recently by this Court in connection with the activities of *State* governments. In *Brush* v. *Commissioner, supra,* this Court had before it the taxability of the salary of the chief engineer of the Bureau of Water Supply of the City of New York.

The Court referred to numerous phrases in considering the words "essential governmental function" there involved. It stated the answer to the problem before it to depend upon whether the water system of the city was created and was conducted "in the exercise of the city's governmental functions" (p. 360).

Later it was said, at p. 361:

> The phrase "governmental functions," as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina* v. *United States,* 199 U. S. 437, 461, it was suggested that the exemption of state agencies and instrumentalities from state taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 172, the immunity from taxation was related to the *essential* governmental functions of the state. In *Helvering* v. *Powers,*

293 U. S. 214, 225, we said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend."

Again, at p. 362:

> In *United States* v. *California*, 297 U. S. 175, 185, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.
>
> In the present case, upon the one side, stress is put upon the adjective "essential," as used in the *Flint* v. *Stone Tracy* case, while, on the other side, it is contended that this qualifying adjective must be put aside in favor of what is thought to be the greater reach of the word "usual," as employed in the *Powers* case. But these differences in phraseology, and the others just referred to, must not be too literally contradistinguished. In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case.

Later, at p. 365, this Court said:

> We are, of course, quite able to see that certain functions exercised by a city are clearly governmental—that is, lie upon the

> nearer side of the line—while others are not as clearly private or corporate in character, and lie upon the farther side.

Upon an analysis of this opinion, we must reach the conclusion that qualifying words prior to the phrase "governmental functions" are of little or no significance.

The analysis which this Court gave in the *Rogers* case to the varied activities in connection with the Panama Canal was, as we have seen, *supra*, pp. 11 to 13, not undertaken for the purpose of determining whether these functions were essentially governmental, but whether they were governmental at all; i. e., functions exclusively of the United States.

III. BASED ON THE DECISIONS OF THIS COURT IN DOBBINS V. COMMISSIONERS, 16 PET. 435, AND ROGERS V. GRAVES, 299 U. S. 401, RESPONDENT'S SALARIES HERE INVOLVED ARE IMMUNE FROM STATE TAXATION, IRRESPECTIVE OF THE STATE STATUTES

1. We have heretofore discussed at length the decision of this Court in *Rogers* v. *Graves, supra*. It is sufficient here to state that in that case this Court stressed how well established was the principle of immunity established nearly a hundred years ago in the case of *Dobbins* v. *Commissioners, supra*, and reaffirmed it.

Those employed by the federal government can be in no different position today than they were in 1842 or in 1937; nor can the effect of such a tax as is here involved be different today. Accordingly,

any contention that the tax does not in fact burden or interfere with the federal government—though proper in connection with a tax upon third persons, such as contractors, dealing with the government—either mistakes the issue in this case, or requires a drastic revision of the doctrine of the *Dobbins* and *Rogers* cases. Such a contention should be addressed to Congress where as we shall show, *infra*, a comprehensive program with respect to the termination of such immunities is now being considered. With Congress studying the problem, there can be no such cogent reasons as are customarily required to warrant this Court in over-turning decisions that have stood for so many years.

2. The instant case presents an even clearer case for immunity than did the *Rogers* and other cases.

The Panama Railroad Company, although originally a private enterprise, had been acquired by the United States government for the purpose of aiding in the construction and operation of the Panama Canal. Referring to certain private business transacted by the railroad company, the Court stated that no importance was attached to this function, and said in the *Rogers* case, at page 408:

> The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection.

This we have seen, *supra*, pp. 11 to 13 in more detail. But in the instant case there is no private aspect of

the business of either one of these corporations. As we shall see, *infra*, pp. 25 to 40, each was chartered by the federal government to perform federal functions believed by Congress to be necessary and has no private incidental purposes. Each was organized for a single purpose—to carry out a governmental policy. It was said by this Court that the creation, management, and operation of the canal are all governmental functions "and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, do not admit of doubt" (p. 406). Can it be any more a matter of doubt that the organization of Reconstruction for the purpose of preventing a national financial collapse or the organization of Regional for the purpose of aiding agricultural enterprises are within the constitutional power of Congress?

The corporations here concerned are more closely related to the federal government than the corporation considered in the case of *Clallam County* v. *United States*, 263 U. S. 341, where real estate and other physical property belonging to the United States Spruce Production Corporation was held not to be subject to taxation.

In the instant case the corporations were not created under State law—a fact which the Court in the *Clallam* case, at p. 345, seems to have considered sufficiently important to give rise to a doubt

that immunities would have existed had it not been for other elements in the case, and the case now before this Court is far stronger than the case presented to it in the *Clallam* case. The incorporation of these corporations was completed by Congress—they were brought into being by federal and not by State law. They operate in the several States throughout the Union for the sole benefit of the people of the United States as a whole, and for corporations organized by them in order to reinforce the financial structure set up by the people, and to afford nation-wide relief to agricultural enterprises. See, *infra*, pp. 25 to 40.[2]

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[2] The judgment below cannot be successfully attacked on the basis of any distinction between officers and employees of the United States. Petitioners do not rely on such a distinction and it will be considered here only briefly. Furthermore, since such a distinction would protect from taxation those best able to pay, it is not believed that such a distinction would be made without compelling reasons.

To the contrary there appears to be no justification for such a distinction. Although an office was involved in the *Dobbins* case this Court stressed there the fact that the tax was not on the office but on the emoluments therefrom. The reasons assigned in the *Dobbins* case for immunity apply equally to the salaries of officers and employees, and it would seem to be immaterial that a salary is fixed by statute or even, as in the case of Reconstruction, pursuant to statute (see Sec. 4 of the Reconstruction Finance Corporation Act) since in *Rogers* v. *Graves*, *supra*, the salary that was declared immune was fixed without regard to any specific statutory authority. Likewise, although in *Helvering* v. *Gerhardt* the distinction between officers and employees was noted, the

IV. ON THE PRINCIPLES OF FEDERAL SUPREMACY LAID DOWN BY THIS COURT IN McCULLOCH *v.* MARYLAND, 4 WHEAT. 316, AND RELIED ON AS RECENTLY AS 1938 IN HELVERING *v.* GERHARDT, 304 U. S. 405, RESPONDENT'S SALARIES HERE INVOLVED ARE IMMUNE FROM STATE TAXATION, IRRESPECTIVE OF THE STATE STATUTES

Recognizing that the United States exercises delegated powers alone it was specifically suggested in *Helvering* v. *Gerhardt, supra,* that with respect to federal immunity from State taxation the proper inquiry should be, *first,* into the power of Congress to create the federal instrumentality in question, and, *second,* into the intent of Congress regarding State taxation with respect thereto.

The same approach is required by the holding of that case. It was based on the proposition that federal powers—there the taxing power—are supreme and that such sovereign powers may be restricted only where the continued existence of the

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reasons assigned for the taxability of the employee there involved are equally applicable to officers.

It would thus be virtually impossible to draw a line between officers and employees with any semblance of reason, and only confusion would arise from the attempt. In any event respondent's position is no less responsible than that of the cutter captain involved in the *Dobbins* case and has no less relation to federal offices than did the position of the general counsel of the Panama Railroad Co. in the *Rogers* case.

Moreover, as we shall see, *infra*, the currency the doctrine of immunity with which we are concerned has received transcends any distinction between officers and employees.

State requires it. So here the exercise by Congress of sovereign federal powers must be as free as Congress wishes it to be from interference by the States—by taxation or otherwise—except perhaps where the continued existence of the State may be threatened. In the greater readiness of Congress than of the States to waive an immunity, by reason of the representation of the people of the States in Congress, this Court found additional support for a broader federal immunity than the States may have.[3] As we shall see, *infra*, it appears likely that Congress will act.

It will not do to consider here factually whether the tax in question burdens or interferes with the United States. The question here is one of intent which we shall show, *infra*, is unmistakable.[4] An inquiry into burdens or interference is proper, with Congress silent, where the tax is imposed upon a

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[3] For instances of such waivers see, *infra*, p. 52 and notes 11, 17, and 19.

[4] That Congress may provide expressly or impliedly for immunity from State taxation with respect to the exercise of sovereign federal powers, when in its opinion such immunity is necessary or proper, has been recognized since early days. See, for example, *McCulloch* v. *Maryland*, *supra*; *Osborn* v. *Bank of U. S.*, *supra*, at p. 864; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, at pp. 589, 592; *Smith* v. *Kansas Title & Trust Co.*, *supra*, at pp. 212-213; *Miller* v. *Milwaukee*, 272 U. S. 713, 716. Indeed in *James* v. *Dravo Contracting Co.*, *supra*, this Court stated that Congress might declare even *private persons* having dealings with the government to be immune from State taxation.

private individual having dealings with the government, as in *James* v. *Dravo Contracting Co., supra,* but, as recognized in that case itself, has no application to a tax upon such salaries as are here involved—at least when Congressional intent is apparent—and should be addressed to Congress.

A. NO QUESTION AS TO THE CONSTITUTIONALITY OF RECONSTRUCTION OR REGIONAL IS PRESENTED IN THIS CASE

No question as to the power of Congress has been raised in this case, either in the proceedings below, or in the petition for certiorari; nor was the question considered by the Court below. It follows that that question is not before this Court. *Connecticut Railway & Lighting Co.* v. *Palmer,* No. 63, October Term, 1938; *General Talking Pictures Co.* v. *Western Electric Co.,* 304 U. S. 175, 177–9; *Warner Co.* v. *Pier Co.,* 278 U. S. 85, 91; *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, 182; *Mechanics Co.* v. *Culhane,* 299 U. S. 51, 59. As this Court said in *Blair* v. *United States,* 250 U. S. 273, at page 279:

> Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

Moreover, there has been no opportunity or occasion for the preparation of an appropriate record

to serve as the basis of the consideration of such questions. See *Polk Co.* v. *Glover*, No. 29, October Term, 1938; *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, 212–213; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162–163; *Liverpool, New York, and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39; *Act of August 24, 1937*, c. 754, 50 Stat. 751.

Accordingly we shall seek to demonstrate, *first*, that Reconstruction and Regional are arms and instrumentalities of the United States engaged exclusively in exercising functions of the United States, and, *second*, that it is the present intention of Congress that the salaries of officers and employees thereof be exempt from State taxation.[5]

[5] We have shown, *supra*, footnote 2, that no distinction can properly be made between officers and employees of the United States for purposes of the instant case. Such a distinction does not even arise where the intent of Congress is concerned since the immunity here involved has firmly been believed and intended to extend to all persons employed by the federal government. See President's Message, bills, remarks, testimony, and Attorney General's opinion discussed on pp. 49 to 60 herein. Thus, too, any testimony regarding the amount of additional taxes the States will collect upon waiver of existing federal immunities has related to *all* persons employed by the federal government. See, for example, testimony of Honorable John W. Hanes, Under Secretary of the Treasury, before the House Committee on Ways and Means, 76th Cong., 1st Sess., January 26, 1939, p. 5.

B. RECONSTRUCTION AND REGIONAL ARE ARMS AND INSTRUMENTALITIES OF THE UNITED STATES ENGAGED EXCLUSIVELY IN EXERCISING THE FUNCTIONS OF THE UNITED STATES

We submit that Reconstruction and Regional are arms and instrumentalities of the United States to the same extent as any department of the government and that their activities are activities of the United States.

The right of Congress to create corporations for the purpose of carrying out its functions has been recognized since *McCulloch* v. *Maryland, supra,* and the use of the corporate form to provide flexibility of operations and administrative convenience in such matters as annual appropriations, preaudits, etc., has frequently been resorted to. *Skinner & Eddy Corp.* v. *McCarl, supra; Reed, Government-Controlled Business Corporations,* 10 Tulane Law Rev., 78, 84–86. Such administrative considerations do not affect the nature of the federal functions involved, or the considerations that enter into their immunity from State taxation. *Rogers* v. *Graves, supra; Clallam County* v. *United States, supra; McCulloch* v. *Maryland, supra.*

The distinction between corporations engaged exclusively in carrying out the functions of the United States and those serving the purposes of profit for individuals as well as the purposes of the United States was pointed out in *Clallam County* v. *United States, supra.* The corporations involved

in the instant case serve no private purposes whatsoever, and as we have demonstrated, *supra*, there is no difference as to essentiality or degree in the functions of the United States.[6]

In *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209, this Court recognized that the functions of Reconstruction are exclusively those of the United States. The Court considered it unnecessary in that case to pass upon the constitutionality of Reconstruction but stated, at page 211, that—

> The purpose that [Reconstruction] has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as a result of the great depression.

That Reconstruction and Regional are arms and instrumentalities of the United States as directly as any department of the government and that they are engaged exclusively in exercising the functions of the United States will be apparent from a detailed statement of their powers, duties, and operations.

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[6] Indeed, unlike the Panama Railroad Co. involved in the *Rogers* case, the corporations here involved do not even have incidental purposes unrelated to the functions of the United States.

Reconstruction was created by Act of Congress on January 22, 1932. The Act, known as the Reconstruction Finance Corporation Act, made detailed provision for the administration of Reconstruction. Its capital of $500,000,000 was supplied by the United States, which alone was authorized to hold its stock (Sec. 2[7]). Its obligations may be issued only with the approval of the Secretary of the Treasury and are fully and unconditionally guaranteed by the United States (Sec. 9). The Secretary of the Treasury is authorized to market such obligations, using therefor all his facilities for the marketing of United States obligations, and all redemptions, purchases, and sales of such obligations by the Secretary are to be treated as public debt transactions (Sec. 9). It is authorized to deposit its monies with the Treasurer of the United States and in turn is authorized to act as depository of public monies and as financial agent of the United States (Secs. 7 and 12). Its management was originally vested in a Board of Directors consisting of the Secretary of the Treasury and six other Directors appointed by the President by and with the consent of the Senate; this Board has recently been changed to consist of five members so appointed (Sec. 3). It is given the franking privilege (Sec. 4). Administrative expenses are in-

[7] When no Act of Congress is mentioned the Reconstruction Finance Corporation Act, as amended, is referred to.

curred by it subject to the annual appropriation Acts of Congress (See, e. g., First Deficiency Appropriation Act, Fiscal Year 1936). It has succession for ten years (Sec. 4). Provision is made for liquidation by it during that time and thereafter by the Secretary of the Treasury (Sec. 13). Any surplus remaining upon liquidation is to be carried into the miscellaneous receipts of the Treasury of the United States (Sec. 13). Reconstruction is required to make quarterly reports of its operations to Congress (Sec. 15). As was stated by Mr. Beedy, a member of a House Banking and Currency Committee that considered the Reconstruction Finance Corporation Act prior to its passage:

> All of the powers, duties, and responsibilities with respect to the administration, execution, and enforcement of the Reconstruction Finance Corporation act will be vested in the board of directors of that corporation. They are the sole representatives of the Government, and the powers, duties, and responsibilities conferred under this act are conferred upon them alone. Cong. Rec., Vol. 75, Part 2, 72d Cong., 1st Sess., p. 1916.

No more than three of the five Directors of Reconstruction may be members of the same political party and not more than one shall be from any one Federal Reserve District (Sec. 3). The officers and employees of Reconstruction take the oath of

office prescribed by U. S. Rev. Stat., Sec. 1757, and their salaries are paid by check drawn on the Treasurer of the United States. On February 8, 1932, the United States Employees' Compensation Commission ruled that all employees of Reconstruction are "civil employees of the United States" within the meaning of the Federal Compensation Act of September 7, 1916, as amended. Employees of Reconstruction are subject to the standardized Government Travel Regulations approved by the President and use transportation requests subject to the approval of the Comptroller General of the United States (see Independent Offices Appropriation Act, 1938). Prior to the adoption of Public Resolution No. 3, 74th Congress, approved February 13, 1935, the salaries of officers and employees of Reconstruction were subject to the reductions from basic pay provided by the federal economy laws. Employees of Reconstruction are subject to annual and sick leave regulations set forth in Executive Orders Nos. 7845 and 7846, issued by the President on March 21, 1938, which provide detailed regulations with respect thereto for the executive branch of the Government.*

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* It is apparent that Congress believed and intended employees of Reconstruction to be employees of the United States. In Sec. 4 of the Reconstruction Finance Corporation Act, as amended, provision was made for Reconstruction:

> to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall

The purposes of Reconstruction are clearly revealed in its legislative history and in the terms of the Acts relating thereto. In the words of the title of the original Act it was "An Act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes." Congressional debate on that Act prior to its passage revealed clearly the current economic problems with which the United States, through Reconstruction, intended to assist. Thus, Senator Walcott, the manager of the Reconstruction Finance Corporation Act on the floor of the Senate prior to its passage, said:

> In view of the unprecedented condition of the financial institutions of the United States, which is partly the cause and partly the effect of the present great world-wide economic collapse—the most severe and far-reaching in history—heroic relief measures

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be necessary for the transaction of the business of the corporation, without regard to the *provisions of other laws* applicable to the employment and compensation of officers or employees of the United States • • •. [Italics added.]

Likewise, Sec. 3 of said Act, which permits the appointment and compensation as an employee of Reconstruction of persons elsewhere employed in the executive branch of the government, was adopted to avoid the prohibitions of 5 U. S. C., Secs. 58 and 62, which forbid any person to hold more than one position within the government. See 75 Cong. Rec., p. 1952; *U. S.* v. *Morse*, 292 Fed. 272.

are needed. Our financial institutions are the mainsprings of our industrial well-being. All enterprises of any sort must look to them for the funds with which to operate, and whenever they fail to function normally industrial activity is inevitably paralyzed.

We are now facing a great emergency in consequence of drastic curtailment of the normal functioning of our banks. On the one hand we have those whose assets, with abnormally shrinking markets, have become frozen, and which, in order to preserve any degree of solvency, must stop doing business; on the other those with adequate cash reserves which, watching these shrinkages, are in terror of impairing their assets, and voluntarily remain in a state of abnormal liquidity. In the cases of both, the business of financing is brought to a standstill, and with it the wheels of activity of every sort stop turning.

The leading financial minds of the country have been puzzling for many months to find a solution for this situation. Many consultations have been held. Many congressional hearings, with many of the leading bankers and businessmen as witnesses, have been carried on with the object of accumulating and acting upon the more constructive ideas available for remedial legislation. Many of the ideas brought forth by these hearings are covered by Senate bill 1, "A bill to provide emergency financing facilities for banks and

other financial institutions, and, other purposes," which I am presenting to the Senate for consideration as reported out of the Committee on Banking and Currency. Cong. Rec., Vol. 75, Part 2, 72d Cong., 1st Sess., p. 1418.*

The situation which Reconstruction was designed to meet is analogous to that described by Mr. Justice Brandeis in *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, at p. 484:

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*The intimate link between such institutions as Reconstruction and the fiscal powers of Congress becomes ever more apparent, when we consider the extent to which currency has been supplanted by credit instruments as a medium of exchange, and the inability of Congress successfully to exercise its powers to tax and to borrow in a paralyzed financial community. See Hearings before the House Banking and Currency Committee on H. R. 5357, 74th Cong., 1st Sess., p. 213; Report of the Comptroller of Currency in 1919, Vol. 2, p. 36. Thus it is significant, to cite only a single factor, that between December 31, 1928, and December 30, 1933, the total number of banks in the country decreased from 25,576, to 15,011, and the total amount of deposits decreased from $56,706,000,000 to $38,505,000,000. See 23rd Annual Report of the Board of Governors of the Federal Reserve System, 1936. As of June 30, 1938, the total number of banks has been increased to 15,287 and the total number of deposits increased to $52,194,913,000. In addressing itself to this distressed financial situation and in taking measures to protect and preserve financial agencies previously created by Congress, Reconstruction is exercising traditional and paramount functions of the United States. *Westfall* v. *United States*, 274 U. S. 256; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416; *Farmers' and Mechanics' National Bank* v. *Dearing*, *supra*; *McCulloch* v. *Maryland*, *supra*.

> These appropriations were made in order to meet a pressing need. At the time of the passage of Transportation Act 1920, most of the railroads of the United States lacked funds for necessary improvements, equipment, and expansion of facilities. Some of the carriers needed funds, also, to meet maturing obligations. The credit of many carriers was seriously impaired. There was a general reluctance among investors to purchase new railroad securities even of the strongest railroads. Congress deemed it important to preserve for the nation substantially the whole existing transportation system. Compare *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 190, 67 L. ed. 605, 609, 43 Sup. Ct. Rep. 270. In order to accomplish this, it was thought necessary that the United States should, to a certain extent, finance the carriers until it would become possible to restore their credit, by increase of rates or otherwise. The provisions of title II. of Transportation Act 1920 were framed to that end. Through them, the financial aid which had been given during Federal control was to be extended for a further period.

Many different powers were conferred upon Reconstruction from time to time by Congress in an effort to approach a complex economic problem from many sides. The principal of these may conveniently be summarized as follows:

It was authorized to make loans to banks, insurance companies, mortgage loan companies, and other financial institutions, "to aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products" (Sec. 5). It was authorized to make loans upon the assets of closed banks, saving banks, or building and loan associations, and to purchase the assets of some of these to aid in an orderly liquidation, reorganization, or stabilization thereof (Secs. 5 and 5e). It was authorized, with the approval of the Interstate Commerce Commission, to make loans to railroads engaged in interstate commerce or to purchase or guarantee the obligations thereof, "to aid in the financing, reorganization, consolidation, maintenance, or construction thereof" (Sec. 5). It was authorized to make loans to "any business enterprise when capital or credit at prevailing rates for the character of loan applied for is not otherwise available" "for the purpose of maintaining and promoting the economic stability of the country or encouraging the employment of labor" (Sec. 5d). It was authorized to make loans to States for "relief of destitution" (Sec. 1 of Emergency Relief and Construction Act of 1932), and to make loans to aid in the relief of disasters caused by floods, tornadoes, cyclones, earthquakes, or conflagrations (Sec. 201 (c) (6) of said Relief Act, as amended and supple-

mented). It was authorized to make loans to States, municipalities, and political subdivisions and other public agencies thereof "to aid in financing projects authorized under federal, State, or municipal law which are self-liquidating in character" (Sec. 201 (a) of said Relief Act, also Sec. 5d). It was authorized to make loans "in order that the surpluses of agricultural products may not have a depressing effect upon current prices of such products * * * for the purpose of financing sales of such surpluses in the markets of foreign countries * * *" (Sec. 201 (c) of said Relief Act), and to make loans "to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States" (Sec. 201 (d) of said Relief Act). It was authorized to make loans to enable drainage, levee, and irrigation districts and similar public bodies, to reduce and refinance their outstanding indebtedness incurred in connection with projects "devoted chiefly to the improvement of lands for agricultural purposes" (Sec. 36 of the Emergency Farm Mortgage Act of 1933).

It was authorized to subscribe for the preferred stock, capital notes, and debentures of national banks and State banks and trust companies if in the opinion of the Secretary of the Treasury such institution was "in need of funds for capital purposes" and he "with the approval of the Presi-

dent" requested Reconstruction to make such purchase (Sec. 304 of an Act approved March 9, 1933, as amended, c. 1, 48 Stat., 6). It was authorized to subscribe for preferred stock or capital notes of insurance companies under similar conditions (Act approved June 10, 1933, as amended, c. 55, 48 Stat., 119–122). It was authorized to subscribe for the stock of national mortgage associations or of mortgage loan companies, trust companies, savings and loan associations, and other similar financial institutions organized under the laws of the United States or of any State "to assist in the re-establishment of a normal mortgage market" (Sec. 5c).

In addition to these discretionary financial powers Reconstruction was directed by Acts of Congress to allocate and transfer various amounts to other branches of the government. In this respect it acts in a capacity similar to that of the Treasury of the United States. Thus, it was directed to make monies available to the Secretary of Agriculture (Sec. 2, and Act approved February 4, 1933), to the Governor of the Farm Credit Administration (Sec. 5 of Farm Credit Act of 1933), to the Secretary of the Treasury (Sec. 2), and to the Farm Loan Commissioner (Sec. 32 of the Emergency Farm Mortgage Act of 1933), and was authorized to supply the funds to enable the Secretary of the Treasury to subscribe for the capital stock of the Home Owners' Loan Corporation on behalf of the

United States (Sec. 4 of Home Owners' Loan Corporation Act of 1933). Reconstruction was also directed to make available a substantial portion of its unobligated funds if requested by the President, to be applied for relief purposes (Title 2, Emergency Appropriation Act, fiscal year 1935; Emergency Relief Appropriation Act of 1935).

Originally Reconstruction's lending powers were limited to one year (Sec. 5). They have been extended from time to time by Executive Order and Congressional action, the most recent extension—to June 30, 1939—being contained in an Act approved January 26, 1937 (c. 6, 50 Stat., p. 5). That Reconstruction's activities are limited to the needs and purpose of the United States is clearly demonstrated therein, since this last extension was conditioned in the following language:

> *Provided,* That in order to facilitate the withdrawal of the credit activities of the Corporation when from time to time during such period the President finds, upon a report of the Board of Directors of the Corporation or otherwise, that credit for any class of borrowers to which the Corporation is authorized to lend is sufficiently available from private sources to meet legitimate demands upon fair terms and rates, the President may authorize the directors to suspend the exercise by the Corporation of any such lending authority for such time or times as he may deem advisable.

In the exercise of these powers and duties Reconstruction's activities have been manifold. These are set forth, as of December 31, 1935, in the Record of this case, at pages 25 to 42, and need not be described here in detail. Suffice it to say that total disbursements authorized as of that time amounted to approximately $10,600,000,000 and total actual disbursements to approximately $8,200,000,000. As of that time, too, repayments of disbursements, excluding allocations to other branches of the Government directed by Acts of Congress, amounted to over 55% of the amounts so disbursed.

It is important to note that these activities have been carried on in strict accord with the needs and purposes of the United States. Thus, in acquiring the preferred stock of banks Reconstruction could not act as an investor or an entrepreneur, but only after the Secretary of the Treasury had found that funds were needed for capital purposes. Likewise the dividend rate on such preferred stock, as have the dividend and interest rates charged by Reconstruction generally, have from time to time been reduced by it in order that the funds it supplies might accomplish their purpose more effectively. (See testimony of Chairman of Reconstruction before House Committee on Banking and Currency on H. R. 11047, 74th Cong., 2nd Sess., p. 2.) Furthermore, pursuant to several statutory provisions, and as a matter of policy generally, Reconstruction's loans are limited to instances

where credit at prevailing rates for the character of the loan involved is not available from private sources (Sec. 5 and 5d; testimony of Chairman of Reconstruction before House Committee on Banking and Currency on H. R. 4240, 74th Cong., 1st Sess., p. 4).

Regional was created by the issuance of a charter directly to it by Reconstruction pursuant to Section 201 (e) of the Emergency Relief and Construction Act of 1932 (R. 23). It was created to make loans to farmers and stockmen, the proceeds of which were to be used for agricultural purposes. Its activities are set forth in detail in the Record herein at pages 15 and 20–22. Originally the entire capital stock of Regional was held in the name of Reconstruction and its Board of Directors was appointed by Reconstruction (R. 11). Thereafter, pursuant to subsequent legislative authority the capital stock of these corporations was transferred by Executive Order to the Secretary of the Treasury and the management transferred to the Farm Credit Administration. See Executive Order No. 6084, March 27, 1933; Executive Order No. 7848, March 22, 1938. Additional funds were obtainable by Regional by rediscounting eligible paper with Reconstruction, the Federal Reserve Banks, and the Federal Intermediate Credit Banks. With capital supplied exclusively from the United States and the management vested in the United States and its instrumentalities Regional was at first in

effect a division of Reconstruction and thereafter of the Farm Credit Administration. Other indications of the identity of Regional with the United States may be found in the brief of the government in *Keifer and Keifer* v. *Reconstruction Finance Corporation and Regional Agricultural Credit Corporation*, No. 364, October Term 1938.

From a review of the organization, the purposes, the powers, and the activities of Reconstruction and Regional, it would seem difficult to imagine a governmental instrumentality more intimately connected with the functions and activities of the United States, or more exclusively devoted thereto. The corporate form was adopted to provide administrative convenience for their manifold activities. But their purposes and activities could not have been more directly those of the United States.[10]

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[10] It is apparent that respondent's contention that Reconstruction and Regional are not exercising essential federal governmental functions known and contemplated at the time the federal Constitution was adopted, but are exercising ordinary business powers, is untenable. As there is no distinction between federal functions as long as they are devoted exclusively to the needs and purposes of the United States, this contention has no basis in principle.

Nor has it any basis in fact. In 1781 the Continental Congress created the Bank of North America and the United States acquired more than one-half of its capital stock. *Lewis, A History of the Bank of North America, 1882.* Then the Constitutional Convention considered a proposal to give Congress specific power to create a bank, *Farrand, The Records of the Federal Convention*, Vol. 2. p. 616, and

C. IT IS THE PRESENT INTENTION OF CONGRESS THAT THE SALARIES OF OFFICERS AND EMPLOYEES OF THE UNITED STATES AND ITS INSTRUMENTALITIES BE IMMUNE FROM TAXATION BY THE STATES

The immunity of the salaries of officers and employees of the United States and its instrumentalities from taxation by the States has been recognized for nearly a hundred years, having first been declared in *Dobbins* v. *Commissioners, supra,* and endorsed and reaffirmed two years ago in *Rogers* v. *Graves, supra.* In the light of such decisions, it is unreasonable to assume that if Congress had intended to permit the taxation of employees of the

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Vol. 3, p. 375, and soon after the adoption of the Constitution the First Bank of the United States was chartered to engage in a variety of lending functions including ordinary commercial loans to individuals, acquisition of real estate mortgages, and loans to State banks, *Holdsworth and Dewey, The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong., 2nd Sess., *passim*, and the balance sheets reprinted at pp. 308–311.

Moreover, Reconstruction and Regional, as we have seen, exercise their powers only in an emergency situation to protect an existing credit structure, to protect existing financial institutions, and only when private credit is not otherwise available. They, therefore, supplement and support rather than supplant existing facilities, and are guided by considerations that differ greatly from those that influence private business. And though we have shown a similarity to the form of private transactions to be superficial, even if such similarity were more substantial it would not affect the governmental nature of the operations. See, *Rogers* v. *Graves, supra; Clallam County* v. *U. S., supra; Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522.

United States and its instrumentalities it would not have said so in clear and unmistakable language.[11]

It certainly cannot be said that Congress has been proceeding in ignorance of the decisions of this Court, for the immunity has been called to its attention on many occasions, and it has, up to the present time, failed to act with respect thereto. At this moment a Senate committee, appointed pursuant to S. Res. 303, 75th Cong., 3rd Sess., is making a careful study of the entire problem as a result of the President's Message to Congress of April 25, 1938, in which he requested legislation *terminating* such tax exemptions, and is required to submit its recommendations by March 1, 1939. The House Committee on Ways and Means has just made a similar investigation into tax-exempt salaries, Hearings on Tax-Exempt Salaries, January 26, 1939, and on February 1, 1939 its Chairman, Congressman Doughton, introduced a comprehensive measure—H. R. 3590—which is one of a legion designed to *waive existing immunities*, on which prompt hearings are scheduled.

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[11] Even with respect to national banks, which serve the purposes of private profit, as well as those of the federal government, this Court has said that an affirmative consent by Congress is necessary before the States can tax either the banks or the shares of stock owned by private individuals therein. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103. Congress did not leave its intention to permit such taxation to speculation, but expressed it affirmatively in unmistakable language in U. S. Rev. Stat., Sec. 5219.

It is obviously the unmistakable intention of Congress to study fully these questions prior to conferring such consent, and it, therefore, cannot be said to have been the intention of Congress to date that such salaries be subject to taxation.[12]

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[12] No guide to the intent of Congress may be found in the corporate organization of Reconstruction and Regional or in the form of their activities. As we have seen they are direct arms and instrumentalities of the United States and it is decisive that the corporate organization of such arms and instrumentalities, or the form of their activities, has never affected their immunity from State taxation. *Rogers* v. *Graves*, *supra*, *Clallam County* v. *U. S.*, *supra*, *McCulloch* v. *Maryland*, *supra*.

Nor may any guide to intent be found in Sec. 10 of the Reconstruction Finance Corporation Act. This provision declares Reconstruction, including its franchise, capital, reserves, surplus, income, and obligations, to be exempt from taxation and consents expressly to State taxation of realty. Such a provision appears to have first been used in 1913, in Sec. 7 of the Federal Reserve Act, and was perhaps important in connection with Federal Reserve Banks since they are owned by member banks. Since that time such provisions have been traditionally used in connection with corporate government instrumentalities, whether or not wholly owned and controlled by the United States, and have served the twofold purpose of consenting to State taxation of realty, and of restating immunities in certain respects to forestall possible attempts by the States to tax such aspects of the instrumentalities, as their franchise, capital, etc. But such provisions do not purport to cover by their terms the entire field of immunity. (See H. Rep. 1995, 74th Cong., 2nd Sess.; H. Rep. 2199, 74th Cong., 2nd Sess.; S. Rep. 1545, 74th Cong., 2nd Sess.) Nor are they necessary to assure immunity. (See cases cited earlier in this footnote.) Since that provision purports both to confer immunity and to consent to taxation, only conflicting inferences can be drawn

As we have said, the immunity of salaries of officers and employees of the United States and its instrumentalities was declared by this Court many years ago in *Dobbins* v. *Commissioners, supra,* and affirmed as recently as 1937 in *Rogers* v. *Graves, supra.* In determining Congressional intent we are not concerned with possible limitations upon the scope of that doctrine, which may be inherent in it [13] or be suggested by present-day conditions; we are concerned only with the currency it has received.

Such currency can readily be ascertained from a few references to recent decisions of this Court. Thus in *Rogers* v. *Graves, supra,* this Court stressed how well established was the rule of the *Dobbins* case and merely applied it to the salary of the General Counsel of the Panama Railroad Co., a corporate instrumentality of the United States, saying at pages 408–409:

> In *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 448–449, this court held that a

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where it is silent. Indeed, neither party is placing any reliance upon it.

Accordingly, that provision is too remote from the instant problem to be useful, while to the contrary Congress has given much consideration to the precise question involved in this case.

[13] For example, it was suggested *passim* in *Helvering* v. *Gerhardt, supra,* that the tax in *Dobbins* v. *Commissioners,* supra, was levied on an office. It should be noted, however, that this contention was made and expressly rejected in the *Dobbins* case itself at page 445.

> state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, *et seq.*, that further discussion is unnecessary.

Brief references to the *Dobbins* case may likewise be found in *Helvering* v. *Therrell, supra.; James* v. *Dravo Contracting Co., supra,* at p. 149; *Trinity-farm Co.* v. *Grosjean,* 291 U. S. 466, 471; *Indian Motocycle Co.* v. *U. S.,* 283 U. S. 570, 577; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 389.

The doctrine has had equal currency in Congress and in the executive branch, as will be pointed out later; but even without such evidence the silence of Congress in the face of the doctrine of the *Dobbins* case would compel the conclusion that salaries such as are here involved were intended to be immune from State taxation.

The silence of Congress in the face of interpretations, whether executive or judicial, with respect to any of the powers of the federal government has long been recognized as a declaration of Congressional intent.[14] See, e.g., cases, *infra,* pp. 61

[14] Since, as recognized in the *Gerhardt* case, the question of federal immunity is one of Congressional intent, it is clear that the cases since *McCulloch* v. *Maryland, supra,* that have

to 64, for instances of executive interpretation. Just such a case of judicial interpretation was recently presented to this Court in *Gwin, White & Prince, Inc.*, v. *Henneford*, No. 75, October Term, 1938. It found an immunity, saying:

> For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra*; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra*; *Adams Manufacturing Co.* v. *Storen*, *supra*. For half a century, following the decision in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local partici-

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recognized federal immunity in the absence of a specific federal statute have implied an immunity with Congress silent, even in the absence of judicial or executive interpretations. In fact, regardless of what differences there may be in the scope of the immunity of interstate commerce from State interference and the immunity of the exercise of federal powers from State taxation, there is a close analogy between these two fields in that immunities have readily been implied in both by the courts and been waived by Congress. See footnote 19, *infra*, and *Whitfield* v. *Ohio*, 297 U. S. 431.

pation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established.

The immunity of salaries of officers and employees of the United States and its instrumentalities has been even more firmly entrenched than the immunity of interstate commerce from a gross receipts tax, since the former immunity has been clearly recognized by this Court, by Congress, and by the executive branch for many years, whereas the scope of the latter has many times been subject to doubt. *Willoughby, The Constitution of the United States* (2d ed.), pp. 1082–1085. Moreover, the silence of Congress in such a case as the instant one would be at least as significant as in the *Gwin, White* case since there the dispute was only between the State and wholly private taxpayers, with power in Congress to settle it in the interest of a free commerce, whereas here the controversy involves the exercise of sovereign powers by the federal government itself and a disputed interference therewith which for many years has been believed to be prohibited and which Congress has not seen fit to permit.[15]

[15] That the problem here involved is one of considerable governmental concern is shown, *infra*, by the detailed Congressional and executive consideration it has received.

Unlike the taxpayer involved in *James* v. *Dravo Contracting Company, supra,* who was an independent contractor with the government—a relationship that has for many years been recognized to confer no immunity from a non-discriminatory tax that does not interfere substantially with the Government [18]—we are here dealing with an employee of a government instrumentality whose immunity has been recognized for an even longer period of time. Accordingly in the *Dravo* case silence of Congress was insufficient to confer an immunity from State taxation, whereas here, as was true in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* the silence of Congress would be insufficient to waive a recognized and established immunity. However, Congress has gone further and revealed an unmistakable intent.

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[18] The decision in the *Dravo* case followed the decision of this Court in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; see *Dravo* case at pp. 156 to 158. Likewise, in his testimony on January 18, 1939, before the Special Senate Committee above referred to Assistant Attorney General Morris said, at p. 43:

> In *Metcalf & Eddy* v. *Mitchell,* the Federal income tax was sustained as applied to a firm which did consulting engineering work under contracts with States and municipalities. That case has been consistently followed, even to the point, in *James* v. *Dravo Contracting Co.,* decided at the last term of Court, that the State of West Virginia could lay a tax of 2% on the gross receipts realized within the State under a contract for the construction of locks and dams for the United States.

Legislative history

At this moment a Special Committee of the Senate on Taxation of Governmental Securities and Salaries, appointed pursuant to S. Res. 303, 75th Cong., 3rd Sess., as a result of the President's Message to Congress of April 25, 1938, is giving careful consideration to the elimination of tax immunities. Not only does it reveal an unequivocal belief that such immunities exist at present and have not previously been waived, but it also reveals concern with the procedure that should be followed to eliminate them and a desire to study such procedure fully before taking steps in that direction. In the words of its Chairman, Senator Brown:

> As we see the inquiry before this committee, it divides itself into two parts: first, should we tax the income from State and municipal bonds, hereafter issued; and, second, the salaries that are paid to employees of the States and the various subdivisions of the States, and at the same time grant to the States the right to levy a tax on income from Federal bonds and on the salaries of employees of the Federal Government.
>
> The next question that comes up, and which the committee would like to hear from the departments of the Government on, is, can this be done by statute, or is a constitutional amendment required, and it seems to me, as a corollary to that proposition, there is a further question. If it can be done by

> statute, should it be so done, or should the Congress submit the question to the States for a clear-cut expression from them as to what they think should be done.
>
> There are many incidental problems to this, but I think those are the main propositions upon which to base our inquiry. Hearings, January 18, 1939, pp. 3, 4.

Congress has recognized that the elimination of such immunities is peculiarly a problem for the legislature; that a comprehensive, not an interstitial program is required.[17] Thus, it desires to avoid inequitable retroactive taxation. See, e. g., H. R. 1653, H. R. 1831, S. 482, S. 554, all 76th Cong., 1st Sess.; President's Message to Congress of January 19, 1939. It desires adequate and well defined safeguards to prevent discrimination and to assure reciprocity. See, e. g., Hearings before House Committee on Ways and Means on H. J. Res. 102, 67th Cong., 1st Sess., p. 11, and H. R. 1655, 76th Cong., 1st Sess., which provides:

> The compensation received as such by officers and employees of the United States and

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[17] U. S. Rev. Stat., Sec. 5219, is an excellent illustration of such comprehensive legislation carefully drafted to determine the kinds of State taxation Congress desired to permit with respect to national banks and designed to prevent discrimination by the States in favor of their own institutions. A recent example of such comprehensive legislation consenting to taxation and avoiding discrimination and double taxation may be found in the Act of March 12, 1936, c. 138, 49 Stat. 1160. See, also, *infra*, note 19.

> its instrumentalities shall be subject to the taxes of the various States in which they have their legal residences in the same manner and to the same extent as the compensation of the other residents of such States: *Provided*, That this provision shall be applicable only to the residents of States which by law likewise make the compensation of the officers and employees of those States and their political subdivisions and instrumentalities subject to the taxes imposed by the internal-revenue laws of the United States.

It also desires, as stated above by the Chairman of the Special Senate Committee, to consider submission of the question to the States as well as to Congress, regardless of constitutional or legal requirements.[18]

Doubt as to the appropriate constitutional or legal procedure for subjecting State securities and employees to federal income taxation would appear to have been a factor in delaying Congressional action (cf. President's Message to Congress of April

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[18] Where a matter affecting interstate commerce is national in character and admits of a uniform and comprehensive plan of regulation, the absence of federal legislation is construed as a declaration that such commerce shall not be burdened by the States. As this Court said in *Brown v. Houston*, 114 U. S. 622, at page 630:

> * * * the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation * * * So long as Congress does not pass any law to regulate commerce among the several States, it thereby

25, 1938), but this factor itself merely emphasizes the unwillingness of Congress to consent to State taxation of the income from federal securities and of federal employees without being assured of a reciprocal federal tax. When Congress has been willing to permit the taxation of income enjoying federal immunity without requiring a corresponding federal tax upon similar income enjoying State immunity, it has not hesitated to do so. For example, it has consented to State taxation of income from federal oil lands. *British-American Oil Co.* v. *Board of Equalization*, 299 U. S. 159; *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45.[19]

> indicates its will that that commerce shall be free and untrammeled * * *

And in *Bowman* v. *Chicago and Northwestern Railway Co.*, 125 U. S. 465, Mr. Justice Field said in a concurring opinion, at page 508:

> The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.

See also *Kelly* v. *Washington*, 302 U. S. 1, 9. For the applicability of such cases to federal immunity from State taxation see footnote 14, *supra*.

In the instant case Congress has gone further and indicated an unmistakable intent with respect to a matter of much concern to it.

[19] Other such consents to State taxation are very common as may be seen from an examination of the statutes of the 73rd Congress, the 74th Congress, and the 75th Congress, 1st Session alone. Real estate is frequently subjected to nondiscriminatory State taxation. Act of June 13, 1933, c. 64, 48 Stat. 130; Act of June 16, 1933, c. 89, 48 Stat. 177; Act of June 16, 1933, c. 98, 48 Stat. 267, Act of January 31, 1934, c. 7, 48 Stat. 347; Act of April 27, 1933, c. 168, 48 Stat. 64[illegible]

The President's Message to Congress of April 25, 1938, summed up the belief of years when it stated that:

> the States, under existing decisions, [do not] levy income taxes on the salaries of the hundreds of thousands of Federal employees.

It urged:

> that effective action be promptly taken to terminate these tax exemptions for the future

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Act of June 27, 1937, c. 847, 48 Stat. 1252, 1255, 1257; Act of August 23, 1935, c. 614, 49 Stat. 700; Act of July 22, 1937, c. 517, 50 Stat. 531. Personal property likewise is frequently subjected to non-discriminatory State taxation as are also shares of stock in government instrumentalities when owned by private individuals. Act of June 16, 1933, c. 98, 48 Stat. 267; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of July 22, 1937, c. 517, 50 Stat. 531. In numerous instances government instrumentalities are subjected to limited State taxation or to State taxation to the same extent as similar State institutions or instrumentalities. Act of June 13, 1933, c. 64, 48 Stat. 133; Act of June 18, 1934, c. 585, 48 Stat. 993; Act of June 26, 1934, c. 750, 48 Stat. 1229; Act of June 27, 1937, c. 847, 48 Stat. 1249, 1255; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806. In still other instances the United States or its instrumentalities are authorized to pay certain amounts to the States or local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 66; Act of April 13, 1934, c. 116, 48 Stat. 577; Act of June 29, 1936, c. 860, 49 Stat. 2026; Act of June 29, 1936, c. 868, 49 Stat. 2036; Act of May 28, 1937, c. 277, 50 Stat. 221; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of August 9, 1937, c. 570, 50 Stat. 570; Act of August 28, 1937, c. 876, 50 Stat. 876; Act of September 1, 1937, c. 896, 50 Stat. 895.

and recommended specifically that

> Congress enact legislation ending tax exemption on Government salaries of all kinds * * *.

The President's Message to Congress of January 19, 1939, was addressed largely to the inequities arising from retroactive taxation under the decision of *Helvering* v. *Gerhardt, supra,* but reiterated the original recommendation for—

> legislation * * * to make private income from all Government salaries hereafter earned * * * subject to the general income tax laws of the Nation and of the several States.

The government witnesses before the Special Senate Committee above referred to expressed the same views. Honorable John W. Hanes, Under Secretary of the Treasury, stated that the Treasury Department—

> urges approval of the proposal * * * to consent to the taxation of the salaries of Federal employees by State and local governments. Hearings, January 18, 1939, p. 4.

Honorable James W. Morris, Assistant Attorney General, likewise endorsed legislation that—

> would permit State taxation of * * * the salaries of Federal officers and employees within their taxing jurisdiction. Hearings, January 18, 1939, p. 36.

In his Message to Congress of April 25, 1938, the President recognized that the views he expounded had been constantly urged on Congress for many

years but that no action has been taken by it. He said:

> For more than 20 years Secretaries of the Treasury have reported to the Congress the growing evils of these tax exemptions.

And Under Secretary Hanes in his above-mentioned testimony in considering the objections that have been raised to the elimination of tax exemption said, at pp. 11–12, that—

> One such objection is that since intergovernmental exemptions have been imbedded in our legal structure for many years, action should be delayed until further study is made of the problem.

He said further, specifically with respect to tax-exempt securities, although this question arose in Congress generally in connection with measures that also dealt with tax-exempt salaries, at p. 4:

> The discontinuance of the issuance of tax-exempt securities by Federal, State, and local governments has been urged consistently by the Treasury Department during many administrations. Condemnation of the inequity resulting from the issuance of such securities has been voiced by former Secretaries Glass, Houston, Mellon, and Mills and by Secretary Morgenthau and my predecessor, former Under Secretary Magill. Almost without exception every spokesman of the Treasury Department since the advent of progressive income taxation has urged the elimination of tax exemption; none has

> ever spoken in favor of its retention. A typical position was that taken by former Secretary Mellon who, more than 15 years ago, wrote the acting chairman of the Committee on Ways and Means:
>
> "* * * it is almost grotesque to permit the present anomalous situation to continue, for as things now stand we have on the one hand a system of highly graduated Federal income surtaxes and on the other a constantly growing volume of securities * * * which are fully exempt from these surtaxes, so that taxpayers have only to buy tax-exempt securities to make the surtaxes ineffective. (December 21, 1922.)"
>
> Former Presidents of the United States, including Presidents Harding, Coolidge, and Hoover, have urged the elimination of tax exemption. This position has been endorsed by a great majority of the individuals and civic organizations who have studied the problem.

And as Assistant Attorney General Morris stated in his above-mentioned testimony, at p. 59:

> Every President of the United States since 1920 has recommended to the Congress that action be taken effectively to terminate the exemption of income from the so-called immune sources. Various hearings have been had on joint resolutions for constitutional amendments, beginning in 1922, and as late as 1937.

Similar detailed testimony was given before the House Committee on Ways and Means, 76th Cong.,

1st Sess., in its Hearings on Tax-Exempt Salaries, on January 26, 1939, pursuant to the President's Message to Congress of January 19, 1939. For example, Under Secretary Hanes said that:

> At present Federal employees are subject to Federal but are exempt from State income taxes. Hearings, January 26, 1939, p. 4.

Turning briefly to the measures that have been introduced in Congress and to the opinions expressed by its members and by and before the Congressional Committees having charge thereof we find a consensus regarding the existence of an immunity of federal officers and employees from State taxation. Yet, despite full consideration and ardent sponsorship, Congress has refused to act. We shall refer only to a few here.

In 1922 the House Committee on Ways and Means considered H. J. Res. 102, 67th Cong., 1st Sess., which proposed a constitutional amendment providing in part that States might tax the salaries of "all public officials of the United States." In 1937 in the Hearings of the Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 5 and S. J. Res. 154, Senator Byrd said at page 46:

> * * * At the present time, as the committee knows, all compensation paid to employees or officers by the Federal Government is exempt from taxation by any State * * *

On April 7, 1938, during the consideration of H. R. 9682, 75th Cong., 3d Sess., Senator Hitch-

cock urged consideration of S. J. Res. 261, which he had introduced and which provided, in part, that—

> Each State shall have power to lay and collect taxes on income derived from compensation of all public officers and employees of the United States or any instrumentality thereof * * *

and stated that—

> There are now pending over 25 proposed constitutional amendments on this subject introduced during the Seventy-fifth Congress.

Likewise, in including in the Congressional Record an address by Honorable John Philip Wenchel, Chief Counsel, Bureau of Internal Revenue, Treasury Department, which said, in part, that—

> There is no doubt, of course, that Congress has the power to subject Federal securities and Federal officeholders to taxation by a State which, but for the cloak of the immunity, would have the jurisdiction to tax. * * *

Congressman Voorhis stated that—

> Removal of tax-exempt privileges is, I believe, one of the first duties of Congress.

Cong. Rec., Vol. 83, Part 10, p. 2155.

See also remarks of Congressman Cochran, at 81 Cong. Rec. 3380, Congressman Treadway, at 82 Cong. Rec. App. 529, and Congressman Hancock, at 83 Cong. Rec. App. 1183, regarding H. R. 8249;

and see also S. 2528, H. R. 8249, H. J. Res. 443, H. J. Res. 444, H. J. Res. 521.

During the current session of Congress at least nine measures have already been introduced all intent upon *waiving* existing immunities. See, e. g., H. R. 1655, quoted above, at pp. 50–51. In addition see H. R. 786, 3590, S. J. Res. 26, H. J. Res. 21, 39, 48, 49, and 59.

Unlike random individual expressions in Congressional debates and before Congressional Committees which are without weight in interpreting specific statutory provisions—*McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488—the foregoing legislative material is clearly competent. See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19; *Penn Mutual Co.* v. *Lederer*, 252 U. S. 523, 534; *U. S.* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 279; *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 650. It is designed to reveal a background of full legislative consideration of the instant problem and of a consistent point of view, and includes such pertinent material as Presidential messages, remarks of a Committee Chairman, and testimony of responsible executive officials who were invited to testify because the instant problem is within the range of their official activities and whose administrative interpretations would themselves be relied on by this Court as a guide to legislative intent.

It is apparent, therefore, that despite the introduction of numerous measures to eliminate the immunity, despite full consideration by appropriate committees, and despite ardent sponsorship in Congress and outside, Congress has refused to permit the taxation of federal salaries by the States. Taxation for past years, such as the instant case involves, is clearly not wanted. How the immunities should be eliminated and how such elimination should be conditioned has caused much discussion through the years and is the subject of the present inquiries of the Special Senate Committee and of the House Ways and Means Committee, which are endeavoring to evolve a comprehensive plan and procedure regarding the elimination of such immunities. Unmistakably it is the present intention of Congress that the immunities shall stand until this is done.

Executive History

We have set forth in the immediately preceding pages the view of the executive branch of the government, long adhered to and constantly reported to Congress, that federal salaries and securities are immune from State income taxation. We have also demonstrated that for many years the Presidents and the Secretaries of the Treasury have requested Congress to eliminate such immunities. Indeed since 1860 an opinion of the Attorney General has stood unchanged, that likewise asserted

unequivocally the immunity of federal officers and employees from State taxation. It provided as follows:

> SIR: The authorities of a State cannot impose a tax upon the salary of a federal officer, or upon the compensation paid by the United States to any person engaged in their service. This was decided by the Supreme Court in the case of *Dobbins* vs. *the Commissioners of Erie County,* (16 Peters, 435). The act of the Virginia Legislature, which you cite in your letter of September 15th, does not authorize such taxation. The demand, therefore, upon the clerks of the Wheeling post office, is not warranted by any legal or constitutional authority, State or national.
>
> Very respectfully, yours, &c.,
>
> J. S. BLACK.
>
> Hon. JOSEPH HOLT,
> *Postmaster General.*

9 Op. A. G. 477.[20]

Even when such interpretations are not specifically called to the attention of Congress—*National Lead Co.* v. *U. S.*, 252 U. S. 140, 146; *Copper Queen Mining Co.* v. *Arizona Board,* 206 U. S. 474, 479—the silence of the latter in failing to alter such interpretation by legislation is deemed to be an

[20] The recent study by the Department of Justice, entitled "Taxation of Government Bondholders and Employees—The Immunity Rule and the 16th Amendment," in connection with the President's Message to Congress of April 25, 1938, is addressed to federal income taxation of State securities

adoption thereof unless clearly erroneous. Thus, with respect to existing statutes, this Court said in *U. S.* v. *Finnell,* 185 U. S. 236, at page 244:

> If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge.

And in *U. S.* v. *Minnesota,* 270 U. S. 181, this Court said at p. 205:

> The Act of 1860 was construed as we here construe it by Secretary Delano in 1874,

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and salaries, but it had occasion to consider the power of Congress to waive the immunity of federal salaries and securities from State taxation saying, at pp. 4-5:

> CHAPTER I
>
> THE SCOPE OF THE FEDERAL TAXING POWER
>
> Federal legislation subjecting federal and state bondholders, officers, and employees to income taxation apparently contains rather fewer constitutional difficulties than would be the case were the legislation enacted by the states. This simplification results because of (a) the power of Congress to waive federal immunity, and (b) the scope of the federal taxing power as contrasted to that of the states.
>
> A. THE POWER OF CONGRESS TO WAIVE THE IMMUNITY OF FEDERAL BONDHOLDERS, OFFICERS, AND EMPLOYEES
>
> It may be expected that, as a part of any program to restrict the exempt classes, Congress would grant to the states authority to tax the interest paid on subsequent issues of United States securities and the compensation thereafter paid to officers and employees of the United States. There seems no room for doubt but that Congress has full power to waive whatever

> 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 *id.* 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction.

See also *Helvering* v. *Winmill*, No. 11, October Term, 1938; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *New York Central Securities Corp.* v. *U. S.*, 287 U. S. 12, 24; *U. S.* v. *Shreve-*

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immunity against state taxation might otherwise be claimed by those who deal with the United States.

Van Allen v. *The Assessors*, in an extended dictum, declared Section 5219 of the Revised Statutes to be constitutional. That section permits nondiscriminatory state taxation of national bank shares. One of the grounds of this decision was that Congress could waive the tax immunity of its instrumentalities. This view has consistently been followed, with respect both to Section 5219 and to other waivers of immunity. And in *Helvering* v. *Gerhardt* the Supreme Court explained the wider scope of the federal taxing power, as opposed to that of the states, in part because of the greater readiness with which Congress will waive a constitutional immunity.

There can, therefore, be no constitutional problem with respect to the power of Congress to waive the tax immunity which perhaps otherwise could be claimed by the federal bondholders, officers, and employees. Whether or not the nature of an income tax is such as to make its source immaterial, Congress has full power to declare that the immunity of the federal source of such income shall not extend to its recipient.

port Grain & Elevator Co., 287 U. S. 77, 84; *U. S.* v. *Sweet*, 189 U. S. 471, 473. Congressional inaction where no federal statute exists, and where there has been both power and opportunity on the part of Congress to act, can stand on no different footing. Cf. *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*.

It follows that when such an executive interpretation has long been adhered to, has consistently been reported to Congress and has been fully considered by Congress, and when despite constant urging that it be eliminated Congress has refused to act, Congress is deemed to intend to preserve the executive interpretation so set forth.

The reasonableness of the executive interpretations so made is evidenced by the confirmation this Court has given them since the *Dobbins* case. Moreover, this Court has indicated that the greater readiness of Congress than of the States to waive an immunity from taxation is a further practical ground for affording the federal immunity stricter protection. Thus it said in *Helvering* v. *Gerhardt*, *supra*, at page 417:

> Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.

The activities of the federal government affect the welfare of the people in all the States, and the people of one State have no means of protection against undue interference with those activities by another State except that afforded by the federal Constitution. On the other hand, each State has its representatives in Congress who may make effective protest against undue interference by the federal government with the State's activities.

CONCLUSION

We submit that the decree entered below was correct, both on principles of State law and on principles of federal immunity and federal supremacy long adhered to by this Court.

Respectfully submitted.

W. Q. VAN COTT,
Pro se.

FEBRUARY 1939.

APPENDIX

Revised Statutes of Utah

80–14–4. Gross income.

Defined.

(1) "Gross income" includes gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

Exclusions from Gross Income.

(2) The following items shall not be included in gross income and shall be exempt from taxation under this chapter: * * *

Tax-Free Salaries.

(g) Amounts received as compensation, salaries or wages from the United States or any posession [sic] thereof for services rendered in connection with the exercise of an essential governmental function.

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